

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,
Plaintiff,
v.
ZILLOW, INC., et al.,
Defendant.

Case No. 2:21-CV-00312-TSZ
**ZILLOW DEFENDANTS' MOTION
TO COMPEL**
NOTE ON MOTION CALENDAR:
September 9, 2022
ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

A party initiating a lawsuit has a fundamental obligation to preserve documents that the party knows, or should reasonably know, will be relevant to the litigation. But Plaintiff REX – Real Estate Exchange, Inc. (“REX”) has failed to meet this most basic of discovery obligations and has stonewalled nearly every attempt to investigate the extent of its deficiencies. Worse, Plaintiff’s failure to do so relates directly to an event that Plaintiff claims is the result of Defendants’ alleged unlawful conduct. Such duplicity is not acceptable.

Since initiating this litigation in March 2021, REX—a self-proclaimed disruptive discount real estate brokerage—has now shuttered its residential business and laid off most of its employees, publicly placing the blame for its failure squarely on alleged actions by Zillow and NAR. In the aftermath of these layoffs, public sources reported that REX’s employees were being told to keep their laptops as severance. Highlighting the perils of such a practice—buried in a footnote in a filing to this Court earlier this year—REX *admitted* to the destruction of documents on such a laptop by a former employee, who is a Court-ordered document custodian.¹

Against this backdrop, Zillow has repeatedly sought assurances that REX has complied with its preservation obligations—including propounding an interrogatory seeking the identification of employees who were allowed to keep their REX issued laptops and the preservation efforts taken in relation thereto. *See* Ex. O, Zillow Defs.’ Third Set of Interrogatories to Plaintiff REX – Real Estate Exchange, Inc. In addition, Zillow and NAR have sought confirmation that such employees received a litigation hold letter at the outset of this case. REX, however, has refused to provide any substantive response to Zillow’s interrogatory or to provide sufficient information to address Defendants’ reasonable inquiries about the extent of REX’s failure to preserve information.

Given REX’s allegations that its business faltered and failed as a result of actions taken by Zillow and NAR, the information contained on the laptops of its former employees, which may shed light on, among other things, other reasons for REX’s failings entirely unrelated to

¹ *See* ECF 138 at 10 n.3 (“Angela Cook, who was included on REX’s Amended Rule 26 disclosures *wiped her laptop after she was let go* and before current counsel was retained.” (emphasis added)).

1 Zillow or NAR, is not only relevant but potentially critical to Zillow’s defenses. Accordingly,
 2 Zillow respectfully requests that this Court order REX to provide the information Zillow has
 3 sought in its discovery request through an interrogatory response and a 30(b)(6) deposition.

4 **II. BACKGROUND**

5 On March 9, 2021, REX filed its original complaint in this litigation, along with a Motion
 6 for a Preliminary Injunction, alleging that defendants Zillow² and the National Association of
 7 Realtors (“NAR”) (collectively, “Defendants”) violated state and federal antitrust and consumer
 8 protection laws. *See* ECF 1, 5. At a minimum, that filing triggered an obligation for REX to
 9 maintain and preserve its documents.³ After the denial of REX’s motion for preliminary
 10 injunction, the parties began propounding discovery requests on one another in October and
 11 November 2021, and the Court entered an ESI Protocol on January 20, 2022. *See* ECF 113.

12 **A. REX Largely Ceases Operations, Blaming Zillow and NAR**

13 Nearly half a year after filing this lawsuit, REX quietly began layoffs in August of 2021.
 14 Najemy Decl.,⁴ Ex. A, THE AMERICAN GENIUS, *Has REX Homes finally ceased operations?*
 15 (May 11, 2022). Then, in May 2022, news articles reported that REX might be ceasing
 16 operations entirely, and winding down. One article, published on May 11, reported that “[a]fter
 17 two rounds of layoffs, a restructure to join MLSs, and swirling rumors regarding leadership,
 18 staffers tell us [REX] has crumbled” and “it appears that as of today, [REX] has ceased
 19 operations.” *Id.* The article further reported, “In August of 2021, REX Homes laid off 60 staff
 20 without severance, and on October 7th, 2021, REX Homes had their second round of layoffs –
 21 both times, staff said they were not initially given severance pay.” *Id.* Another article reported
 22 that, during a Zoom call on May 6, 2022, REX’s CEO announced that “the vast majority of
 23 [REX’s] 180 workers would be laid off” and urged employees “to quickly clean out their desks.”

24
 25 ² REX’s initial Complaint named Zillow, Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing Services,
 26 Inc., Zillow Group Marketplace, Inc., and Trulia, LLC. *See* ECF 1. On March 30, 2021, Zillow Group Marketplace,
 Inc. was dismissed. *See* ECF 36. The remainder of the Zillow-affiliated entities named in the Complaint are
 collectively referred to herein as “Zillow” or the “Zillow Defendants.”

27 ³ REX’s obligation to preserve documents began earlier than the filing of its original complaint, at the time it
 anticipated bringing litigation against Zillow and NAR and should have known “evidence may be relevant to ...
 future litigation.” *See Knickerbocker v. Corinthian Colleges*, 298 F.R.D. 670, 677 (W.D. Wash. 2014).

28 ⁴ Exhibits cited herein are to the Declaration of Laura Najemy in Support of Zillow Defs.’ Motion to Compel.

1 Ex. B, REALTRENDS, *REX lays off most of its employees, sources say* (May 11, 2022). It appears
 2 that what is left of REX is a “B-to-B” business “helping corporate landlords buy and sell homes.”
 3 Ex. C, REALTRENDS, *REX survives as facilitator for corporate landlords* (May 23, 2022).

4 Around the time REX was shuttering its residential real estate business, it also replaced
 5 its original litigation counsel.⁵ Public statements by REX executives (and REX’s own discovery
 6 responses in this matter⁶) have blamed Zillow and NAR’s allegedly anticompetitive conduct for
 7 its downsizing. Ex. F, INMAN, *Demise of discount brokerage REX may be imminent, reports*
 8 *indicate* (May 11, 2022); Ex. C.

9 **B. Zillow Seeks to Confirm REX Has Adequately Preserved Relevant**
 10 **Information and Documents, to No Avail**

11 On May 12, 2022, the day following the article reporting that REX had “crumble[d],”
 12 Zillow wrote to REX asking REX to confirm in writing, that: “(a) REX has fully preserved all
 13 documents and other materials relevant to this litigation. . . ; and (b) in the winddown of REX’s
 14 business operations, you and your client have made, and will undertake, all efforts to ensure that
 15 materials relevant to this litigation are not lost, destroyed or otherwise disposed.” Ex. G, Letter
 16 from Jurata to Goldfarb (May 12, 2022). Shortly thereafter, counsel for Zillow discovered a
 17 former REX employee’s May 8, 2022 post on Glassdoor (an online database of company
 18 reviews) providing “Advice to [REX] Management” that, “When you lay people off, don’t tell
 19 them that their laptop is their severance.” See Ex. H, Glassdoor Review (May 8, 2022).

20 REX did not respond to Zillow’s May 12 letter. Zillow wrote again to REX on May 24,
 21 seeking a response to its earlier letter and raising the report regarding REX executives informing
 22 employees that they could keep their laptops as “severance.” Ex. I, Letter from Jurata to
 23 Goldfarb (May 24, 2022). The letter specifically asked REX to confirm that it was ensuring all
 24 information available on REX-issued laptops of custodians was “appropriately accounted for in

25 ⁵ In April 2022, REX retained new counsel: Carney Badley Spellman, P.S. and Boies Schiller Flexner LLP. See
 26 ECF 125-134. On May 18, Foster Garvey, REX’s initial attorneys, withdrew representation. ECF 135. On July 1,
 27 2022, Foster Garvey provided notice of an attorneys’ lien. Ex. D. McCarty Law PLLC, also attorneys for REX
 since the commencement of this litigation, has not yet filed a notice of withdrawal. The law firm of Lehotsky Keller
 LLP withdrew in January 2022. ECF 111.

28 ⁶ REX has also claimed in discovery that “due to Zillow’s and NAR’s anticompetitive conduct,” it had “let about
 250 employees go since January 2021.” Ex. E, Plaintiff’s Response to Zillow Defs.’ Third Set of Interrogatories.

[REX's] preservation efforts.” *Id.* On May 25, REX responded that it “is cognizant of its discovery obligations, and has already taken steps to ensure it can fulfill its discovery obligations and will continue to take necessary steps to meet its discovery obligations.” But the letter provided no further detail and wholly ignored Zillow’s requests pertaining to the preservation of REX-issued laptops. Ex. J, Letter from Goldfarb to Jurata (May 25, 2022). The next day, Zillow again wrote to REX to seek confirmation as to REX’s document retention of employees’ REX-issued laptops. Ex. K, Letter from Jurata to Goldfarb (May 26, 2022).

C. REX Amends its Initial Disclosures and Zillow Propounds Interrogatory No. 8

On May 26, 2022, REX served Amended Initial Disclosures, which removed 16 of the REX employees (or former employees) previously identified as likely to have discoverable or relevant information in REX’s Initial Disclosures.⁷ Compare ECF 138-2, Plaintiff’s Initial Disclosures (“REX’s Initial Disclosures”), with ECF 138-5, Plaintiff’s Amended Rule 26 Initial Disclosures (“REX’s Amended Initial Disclosures”). Notably, the 16 removed individuals included six real estate agents who submitted declarations in support of REX’s Motion for Preliminary Injunction. Compare ECF 138-2, at 3-4, 8 and ECF 6, 9-14, with ECF 138-5. According to their LinkedIn profiles, at least 14 of those 16 individuals were no longer employed by REX as of May 2022. See Ex. L.

On June 1, 2022, REX finally responded to Zillow’s inquiry regarding REX-issued laptops, confirming only that REX had taken and was taking additional steps to preserve information on “the laptops of its *designated custodians* and of the other current and former employees on its *amended* Rule 26 disclosures.” Ex. M, Letter from Goldfarb to Jurata (June 1, 2022) (emphasis added). Still having received no answer to whether REX’s former employees were allowed to leave with their REX-issued laptops before they were appropriately preserved, Zillow reminded REX that relevant information to the parties’ claims or defenses, which REX

⁷ It appears that REX amended its Initial Disclosures to remove several individuals in response to NAR’s request that REX “expand its custodian list to include all persons identified as potential trial witnesses in its initial disclosures.” ECF 138, at 3 (citing ECF 138-4, Bonanno Decl., Ex. 3 (Mar. 23, 2022 Email from Bonanno to Hodges)).

1 had a duty to preserve, “could well be present on the laptops of former REX employees,
 2 including those identified by REX in its originally served Rule 26 disclosures, who have now
 3 been removed by REX in its amended disclosures, and who previously provided declarations in
 4 support of REX’s motion for a preliminary injunction just last year.” Ex. N, Letter from Jurata
 5 to Goldfarb (June 1, 2022). Zillow once again requested confirmation that REX was “ensuring
 6 that all information available on REX-issued laptops of any former REX employees is
 7 appropriately accounted for in its preservation efforts.” *Id.*

8 On the same day, in light of REX’s recent layoff of the majority of its employees and its
 9 apparent practice of allowing former employees to retain REX-issued laptops, Zillow
 10 propounded Interrogatory No. 8. That interrogatory requested the following:

11 Identify all employees (by name, last position/job title held while employed at
 12 REX, and last day of employment at REX) who have left REX, including any
 13 employees whose employment was involuntarily terminated, since January 2021
 and state whether such employees were permitted to retain any REX-issued laptops.

14 Ex. O, Zillow Defs.’ Third Set of Interrogatories to Plaintiff REX – Real Estate Exchange, Inc.⁸

15 **D. REX Admits to Destruction of Potentially Relevant Material**

16 On June 21, REX disclosed for the first time—buried in footnote 3 to its Joint
 17 Submission regarding REX’s Disclosure of Custodians Pursuant to this Court’s ESI Order—that
 18 Angela Cook, a former REX employee who REX had identified as an individual that it may call
 19 to testify at trial, had “wiped her laptop after she was let go.” ECF 138 at 10 n.3; *see* ECF 138-
 20 2, ECF 138-5. Notably, REX failed to mention this document destruction in *any* of its letters in
 21 response to Zillow’s questions regarding REX’s document preservation efforts. REX
 22 represented that although counsel ensured Ms. Cook’s emails and documents saved on shared
 23 drives have been preserved, “ESI exclusively on her laptop will be *impossible to obtain* at this
 24 time.” ECF 138 at 10 n.3 (emphasis added).

25 On June 27, the Court entered an Order requiring that REX include Ms. Cook as a

26
 27 ⁸ After receiving Interrogatory No. 8 and in response to Zillow’s June 1 letter, REX claimed that it has no obligation
 28 to respond to “letters from Zillow seeking to obtain through a letter writing campaign information about REX’s
 discovery preservation measures.” Ex. P, Letter from Goldfarb to Jurata (June 6, 2022). REX did not confirm, and
 to date has not confirmed, the extent of any preservation of the REX-issued laptops of former REX employees.

1 custodian and finding that Ms. Cook is “likely to have relevant ESI in [her] possession, custody,
 2 or control.” ECF 139, Minute Order at 2-3. Following the Court’s order, NAR requested a
 3 meet and confer with REX about REX’s document preservation practices, including “(1) the
 4 steps REX has taken to preserve documents *for each REX custodian*; (2) when REX first
 5 learned that Ms. Cook’s documents were deleted; (3) what steps REX has taken to recover Ms.
 6 Cook’s deleted documents; and (4) whether any documents held by other custodians or *persons*
 7 *identified on any of REX’s disclosures* have been deleted.” Ex. Q, Excerpted email from
 8 Bonanno to Goldfarb (June 28, 2022) (emphasis added).

9 **E. REX Provides Insufficient Responses to Discovery Inquiries**

10 On July 1, 2022, REX responded to Zillow’s Interrogatory No. 8, claiming that the
 11 information requested was not relevant or proportionate to the needs of this case. Ex. E,
 12 Plaintiff’s Response to Zillow Defs.’ Third Set of Interrogatories. Despite the Court’s Order
 13 just days before requiring REX to designate custodians based on its original Initial Disclosures,
 14 REX’s response noted that it “already provided information” regarding the laptops of employees
 15 listed on REX’s *Amended* Initial Disclosures, ignoring the numerous former employees that had
 16 been removed from REX’s Amended Initial Disclosures but who were earlier identified as
 17 having relevant information.⁹ On July 13, 2022, Zillow sent a letter to REX noting these
 18 deficiencies in REX’s response and demanding an immediate meet and confer to discuss the
 19 basis for REX’s objections if REX was not going to promptly supplement its inadequate
 20 response. Ex. R, Letter from Najemy to Goldfarb (July 13, 2022). REX did not even bother to
 21 acknowledge this letter.

22 On July 15, all parties met and conferred regarding REX’s document preservation
 23 practices generally, centered around REX’s failure to preserve Ms. Cook’s documents. Though
 24 REX supplied some information regarding Ms. Cook’s laptop, REX’s counsel did not
 25 definitively respond to Defendants’ questions concerning even the most basic information
 26 regarding REX’s preservation efforts, including, but not limited to:

27
 28 ⁹ Zillow does not know whether these employees, like Angela Cook, retained their laptops after they left REX, but
 would have expected such information in response to Interrogatory No. 8.

- Whether REX issued a litigation hold for this case and if so, when, and to whom it was sent;
- What documents were preserved for custodians and when those documents were preserved;
- Whether any documents held by other custodians or persons identified on any of REX's disclosures have been deleted;¹⁰
- Details regarding the steps the e-discovery vendor took to attempt to recover information from Ms. Cook's laptop;
- The date that REX's current law firm learned Ms. Cook had wiped her laptop;¹¹
- Whether Ms. Cook specifically received a litigation hold and, if so, when; and
- What documents Ms. Cook did and did not delete.

See Ex. S, Letter from Najemy to Goldfarb (July 26, 2022), at 4. Having received no further response from REX regarding its document preservation efforts or a meet and confer about Interrogatory No. 8, Zillow sent REX a letter on July 26 again raising the deficiencies in REX's Interrogatory No. 8 response and REX's delay in responding to basic questions about REX's document preservation efforts. *Id.* Zillow demanded a complete response to Interrogatory No. 8 as well as the information regarding REX's document preservation efforts.

Although REX provided a narrow response on July 27 regarding Ms. Cook's documents, *see* Ex. T, Letter from Goldfarb and Ungaro to Najemy (July 27, 2022), it provided no additional information regarding Interrogatory No. 8 or REX's document preservation more generally. Following the parties' meet and confer on August 10, REX confirmed on August 12 that it would not be supplementing its response to Interrogatory No. 8. Ex. U, Email from Goldfarb to Beringer (Aug. 12, 2022).

F. Zillow Has in Good Faith Conferred with REX to Resolve This Dispute

Pursuant to LCR 37(a)(1), Zillow certifies that it has in good faith conferred with REX to try to resolve the disputes in the instant Motion without Court action. The parties met and

¹⁰ Notably, when Zillow raised that REX never responded to Zillow's request for a meet and confer on Interrogatory No. 8, REX's counsel refused to discuss the interrogatory, claiming it unrelated to the topic of the meet and confer. *See* Ex. S, at 3-4.

¹¹ Counsel generally represented that they became aware that Ms. Cook had erased her laptop after REX had already made its Initial Disclosures but provided no specific date.

1 conferred over Zoom on July 15 and August 10. The parties also have exchanged numerous
2 letters for over three months regarding the issues raised herein, and are now at an impasse.¹²

3 **III. ARGUMENT**

4 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
5 party’s claim or defense and proportional to the needs of the case, considering the importance
6 of the issues at stake in the action, the amount in controversy, the parties’ relative access to
7 relevant information, the parties’ resources, the importance of the discovery in resolving the
8 issues, and whether the burden or expense of the proposed discovery outweighs its likely
9 benefit.” *Ball v. Manalto, Inc.*, No. C16-1523 RSM, 2017 WL 1788425, at *2 (W.D. Wash.
10 May 5, 2017) (quoting Fed. R. Civ. P. 26(b)(1)). “The party who resists discovery has the burden
11 to show that discovery should not be allowed, and has the burden of clarifying, explaining, and
12 supporting its objections.” *Lauer v. Longevity Med. Clinic PLLC*, No. C13-0860-JCC, 2014
13 WL 5471983, at *3 (W.D. Wash. Oct. 29, 2014).

14 Having brought this action, REX should not be allowed to evade discovery regarding its
15 preservation of potentially important evidence—which recent developments have put in issue.
16 By alleging that actions by Zillow and NAR caused its business to collapse, REX’s business
17 operations and business decisions are directly relevant to the case. REX’s refusal to provide
18 essential information regarding whether or not it has properly preserved evidence of former
19 employees violates REX’s discovery obligations under the Federal Rules, and REX should be
20 ordered to comply with those discovery obligations.

21 **A. REX Appears To Be Flouting its Preservation Obligations**

22 Preservation of documents is critical to the discovery process and is triggered as soon as
23 a party begins contemplating litigation. *See Knickerbocker*, 298 F.R.D. at 677-78. A party has
24 an obligation to preserve “any documents or tangible items that the party knows or should know
25 are relevant to the litigation, as well as to documents in the possession of employees who are
26 ‘key players’ in the case,” *id.*, that is, “those employees likely to have relevant information,”

27
28 ¹² Zillow understands that NAR has made similar efforts to obtain information from REX about its document preservation efforts for former employees, and has been similarly stonewalled by REX in response.

1 *Glob. Music Rts., LLC v. Radio Music License Comm., Inc.*, No. CV 16-9051 TJH (ASX), 2020
 2 WL 10692695, at *2 (C.D. Cal. Aug. 3, 2020). Under Rule 37(e), a court may order relief to a
 3 party prejudiced by the loss of information that was not appropriately preserved, including
 4 sanctions. Fed. R. Civ. P. 37(e).¹³

5 REX's duty to preserve evidence in this case was triggered at least as early as March
 6 2021, when it filed its Complaint and Motion for Preliminary Injunction. And REX was
 7 undoubtedly obligated to preserve evidence in January 2022—a year after the litigation
 8 commenced and months after initial discovery requests had been served—when the Court
 9 ordered that REX and the other parties “shall preserve *all discoverable ESI* in their possession,
 10 custody, or control.” ECF 113, at 7 (emphasis added). Yet, in May 2022, at the same time REX
 11 was apparently laying off most of its employees, a former REX employee posted on Glassdoor
 12 that REX was permitting its former employees to retain REX-issued laptops as “severance.” *See*
 13 Ex. H, Glassdoor Review (May 8, 2022); *supra* Section I.A. REX also disclosed that former
 14 REX employee Angela Cook had destroyed the ESI on her laptop. ECF 138 at 10 n.3.

15 Zillow's efforts to ascertain whether document preservation issues may have occurred—
 16 especially concerning information on REX-issued laptops of former REX employees that were
 17 no longer in the possession, custody, or control of REX—were blocked at every turn. REX has
 18 stonewalled, either ignoring Zillow's questions entirely, or delaying by providing non-
 19 substantive answers. *Supra* Sections I.B, I.E. Zillow has made numerous attempts to get to the
 20 bottom of what REX has and, more importantly, has not done to preserve relevant documents in
 21 this case. But these questions remain unanswered after more than three months of diligent effort.

22 Zillow does not know the full extent of any document destruction, does not have a
 23 complete response to its Interrogatory No. 8, and does not have any substantive information
 24 backing up any of REX's representations about its discovery preservation efforts. If former
 25

26 ¹³ *See also WeRide Corp. v. Kun Huang*, No. 5:18-CV-07233-EJD, 2020 WL 1967209, at *12 (N.D. Cal. Apr. 24,
 27 2020) (awarding sanctions when the party spoliated ESI through the deletion of email accounts and computers of
 28 employees who left the party's employ, among other conduct); *Siskiyou Buckle Co., Inc. v. GameWear, Inc.*, No.
 CV 09-3073-CL, 2011 WL 13248530, at *8 (D. Or. Nov. 3, 2011) (awarding monetary sanctions when the party
 was “grossly negligent in its preservation of evidence” when it, among other conduct, failed to adequately instruct
 its employees regarding a litigation hold and failed to take steps to cease its ordinary, routine deletion practices).

1 REX employees—including individuals identified by REX on its Initial Disclosures—have
 2 taken with them or destroyed information relevant to the parties’ claims or defenses that REX
 3 has not otherwise preserved, Zillow is entitled to know. This information should be readily
 4 available to REX, and any burden or expense of providing this information is small in
 5 comparison to the relative importance of these issues to the litigation.

6 **B. REX’s Objections to Interrogatory No. 8 Are Baseless**

7 Zillow propounded Interrogatory No. 8, asking REX to identify the employees who left
 8 since January 2021 and whether they were permitted to retain REX-issued laptops. Given
 9 REX’s significant layoffs and apparent policy of allowing former employees to retain their REX-
 10 issued laptops as severance, this Interrogatory is plainly relevant as it would allow Zillow to
 11 determine if there were any preservation issues regarding those employees. Ex. O.

12 REX has refused to respond. Yet REX has failed to credibly articulate why the
 13 information sought by Interrogatory No. 8 is irrelevant (it is not) or disproportionate (it is not)
 14 to the needs of the case. *See* Ex. E. It is REX’s burden to explain its objections—not Zillow’s.
 15 *Lauer*, 2014 WL 5471983, at *3.

16 Concerning relevance, REX claims “[t]he overwhelming majority” of the 250 employees
 17 let go since January 2021 “were salaried agents and non-managerial employees, whose
 18 employment at REX had no or at most *de minimis* relevance to the issues involved in this case.”
 19 Ex. E. Yet, real estate agents, including salaried ones, are among the very declarants REX relied
 20 on in support of its Motion for Preliminary Injunction *and* disclosed in its Initial Disclosures.
 21 *See* ECF 6, Lawrence Decl. ¶¶ 1-2; ECF 9, Maggio Decl. ¶¶ 1-2; ECF 10, Van Ham Decl. ¶¶ 1-
 22 2; ECF 11, Echevarria Decl. ¶¶ 1-2; ECF 12, Reina Decl. ¶¶ 12; ECF 13, Rosenbaum Decl. ¶¶ 1-
 23 2; ECF 14, Kruse Decl. ¶¶ 1-2. Despite removing six of the seven agents from its Amended
 24 Initial Disclosures without explanation, REX admitted in its Initial Disclosures that each of these
 25 individuals was “likely to have discoverable information.” *Compare* ECF 138-2 (identifying
 26 Todd Rosenbaum, Brandy Lawrence, Viktor Kruse, Raphael “Rio” Reina, Josephine Maggio,
 27 Phil Van Ham, and Randall Echevarria) *and* ECF 138-5 (identifying only Raphael “Rio” Reina).
 28 In its Motion for Preliminary Injunction, REX cited to the declarations of several REX

employees and salaried real estate agents to support its arguments that Zillow and NAR's alleged conduct injures competition and has irreparably harmed REX. *See* ECF 5 at 6, 13, 16, 18-22. Several of those declarants attached exhibits with their preliminary injunction declarations, at least some of which appear to be particularly relevant to Zillow's defenses.¹⁴ For example, one concerns problems with REX's marketing,¹⁵ and one concerns the ways in which buyers might access REX's listings on the "Other" tab of Zillow's website.¹⁶ REX real estate agents, in particular these declarants, are likely to have information relevant to Zillow's defenses, yet are not accounted for in any of REX's representations regarding its preservation efforts.

Additionally, at least 19 of the 26 employees that REX identified in its Initial Disclosures, including real estate agent declarants, appear to have left REX since January 2021. *See* Ex. L. Thus, individuals likely to have discoverable—*i.e.*, relevant—information left REX since January 2021, and may be among the former employees REX permitted to retain REX-issued laptops, perhaps without REX preserving any information contained on those laptops. That REX made the conscious decision to shed these employees and remove at least some of them from its Amended Initial Disclosures does not change REX's discovery obligations, especially not when REX claims that Zillow and NAR are at fault for these very same layoffs. REX's claim that the employees who left since January 2021 had "no or at most *de minimis* relevance to the issues involved in this case" is dubious in light of its previous inclusion of them on its Initial Disclosures. Zillow should be entitled to test REX's self-serving claims.

REX claims the employees listed in its *Amended* Rule 26 disclosures are the only employees "whose laptops are potentially relevant." Ex. E. But this ignores, at minimum, the 16 employees who were identified as having relevant information in REX's Initial Disclosures, including six of the individuals who submitted declarations supporting REX's Motion for

¹⁴ *See* ECF 9, Maggio Decl.; ECF 10, Van Ham Decl.; ECF 13, Rosenbaum Decl.

¹⁵ REX quoted Exhibit C to the Van Ham Declaration, in which a client states, "The REX marketing is not working," to support REX's argument that Zillow's display change harmed REX's brand and goodwill, presumably because REX could no longer leverage Zillow's platform to market itself. ECF 5, at 20.

¹⁶ In Exhibit A to the Maggio Declaration, the REX agent advises the client, "Buyers will now be searching in [the "Agents" and "Other"] tabs for homes." ECF 9, at 8. The REX agent further explains, "Most buyers are searching for homes by setting very specific parameters based on what they are looking for (price range, bed/bath count, pool, etc.)" and then suggests ways to "boost" the client's listing, suggesting that the "Other" tab does not keep buyers from finding the REX listing. *Id.*

1 Preliminary Injunction, but who do not appear in REX's Amended Initial Disclosures. As
 2 discussed above, all seven real estate agents who submitted declarations in support of REX's
 3 Motion for Preliminary Injunction are likely to have relevant information, but *six of the seven*
 4 agents were removed from REX's Amended Initial disclosures—without explanation. The roles
 5 of the remaining 10 of the 16 employees who were initially disclosed as likely to have
 6 discoverable information but were later removed include REX's Chief Technology Officer, Vice
 7 President of Business Development, Director of Analytics, Chief Data Scientist, and Regional
 8 Sales Managers. ECF 138-2, at 1-5. REX cannot credibly claim that the laptops of these
 9 individuals (who are not included in REX's Amended Initial Disclosures) are not relevant.

10 Finally, REX has never explained how providing a list of former employees who have
 11 kept their laptops after leaving is burdensome or disproportionate. Simply put, it is not.

12 **C. The Court Should Compel REX to Answer Interrogatory No. 8 and**
 13 **Designate a Rule 30(b)(6) Representative**

14 In light of REX's failure to respond to Interrogatory No. 8 and provide basic information
 15 about REX's document preservation efforts, Zillow respectfully requests that the Court order
 16 REX to provide a complete response to Interrogatory No. 8—specifically, a list of all employees
 17 (by name, last position/job title held while employed at REX, and last day of employment at
 18 REX) who have left REX since January 2021, stating whether such employees were permitted
 19 to retain any REX-issued laptops. Zillow also requests that the Court order REX to designate
 20 one or more persons to testify as a Rule 30(b)(6) representative regarding REX's document
 21 preservation efforts in connection with this litigation. As such a deposition is necessary due to
 22 REX's conduct, Zillow requests that such deposition not be counted against Zillow's ten
 23 (10) depositions permitted without leave of Court under Rule 30(a).

24 **IV. CONCLUSION**

25 For the foregoing reasons, Zillow respectfully requests that the Court compel REX to
 26 provide complete answers to Interrogatory No. 8. In addition, REX should be ordered to
 27 designate one or more persons to testify as a Rule 30(b)(6) representative regarding REX's
 28 document preservation efforts in connection with this litigation.

1 Dated: August 19, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2022, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which will send notification of such filing to counsel of record.

Dated: August 19, 2022

s/ Nicole Tadano
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